

## CHAPTER 16

PHYSICAL OR MENTAL INCAPACITATION1601 DEFINITIONS

160101. Physically or Mentally Incapacitated Retiree. An individual who is impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes which prevent sufficient understanding or capacity to competently manage the his or her own affairs.

160102. Committee. A person, assembly, or board of persons to whom the consideration or management of any matter is committed or referred by some court, as a person or persons having guardianship of the person and property of an insane person.

160103. Conservator. A guardian, protector, or preserver; a maintainer.

160104. Court of Competent Jurisdiction. A court having power and authority of law at the time of acting to do the particular act; one that has jurisdiction both of the person and of the subject matter; one provided for in the Constitution (reference (df)) or created by the legislature and which has jurisdiction of the subject matter and of the person.

160105. Guardian. A person who legally has the care of the person or property, or both, of another person who is incompetent to act for himself or herself.

160106. Trustee. As used in the legal sense, a person who takes and holds the legal title to the trust property for the benefit of another, one to whom another's property is legally committed in trust; or a person holding the legal title to property under an expressed or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person.

1602 PHYSICALLY INCAPACITATED RETIREE

160201. It frequently has been held that physical infirmity does not warrant the appointment of a guardian for the estate of a person. A statute which makes physical disability or infirmity a ground for the appointment of a guardian of the property of a person mentally competent, but physically incompetent is unconstitutional and an unwarranted abridgment of the liberty of such person, and an unwarranted abridgment of the person's right to acquire, possess, and protect property. On the other hand, in some cases, incompetence to manage an estate or property has been found primarily from evidence of advanced age and physical infirmity, and a guardian or conservator has been appointed. Also, in some jurisdictions there are statutes, held to be constitutional, which authorize the appointment of guardians of the estates of those who, because of old age or physical incapacity, are incapable of managing their property.

160202. In several states, statutes authorize persons who, although of sound mind, believe themselves incapable of managing their own estates or of caring for their own property, to apply for, request or consent to the appointment of a conservator or guardian of the estate or of their persons, or both. The conservator or guardian, when appointed, possesses over the estate substantially the same power and is subject to substantially the same duties as a guardian of an incompetent.

160203. Because of the variety of county and state statutes regarding the appointment of legal representatives for physically incapacitated members, the DFAS Centers accept and process court orders appointing such representatives. It is not the responsibility of the DFAS Center to authenticate each order.

160204. Examples

A. A person who is bedfast and physically incapacitated as the result of two strokes is not necessarily incompetent so as to require the appointment of a guardian.

B. A 77-year-old woman suffering from complete paralysis of the left side, was unable to speak except an occasional word, could not swallow and could write only with difficulty and very briefly, but could hear, read, watch television, walk with assistance, and could be out of bed and sit up for short periods of time. She was, according to medical testimony, mentally competent, but the evidence was sufficient to support a finding that she was physically incompetent and unable to manage her property.

C. When an adult person has sufficient mental capacity to understand the nature and consequences of the application for a conservator, that person's wishes, if conducive to welfare and contentment of mind, may properly be given great weight in determining whether a conservator (rather than a guardian) should be appointed.

D. The physical condition of the person for whom a conservator is required can be considered only insofar as it may affect the person's mental condition.

1603 MEDICAL EXAMINATION

160301. Federal agencies authorized to make determinations of the competency of a retired service member hospitalized in a facility under its jurisdiction are:

- A. Department of the Army
- B. Department of the Navy
- C. Department of the Air Force
- D. Department of Health and Human Services

## E. Department of Veterans Affairs

160302. Upon receipt of information that a retiree may be mentally incapacitated, a board of no fewer than three medical officers or physicians (including one specially trained in treatment of mental disorders), is convened to determine whether the retiree is competent. The board is also convened when requested to do so by proper authority.

160303. The convening authority ensures that the board's findings are certified by three members of the board.

160304. The convening authority sends one copy of the board's findings, as applicable, to:

A. Army and Air Force. Director, DFAS-Cleveland Center, Attn: DFAS-CL/DG, A.J. Celebrezze Building, 1240 East 9th Street, Cleveland OH 44199-2055.

B. Navy and Marine Corps. Head, Fiduciary Affairs Branch, Civil Affairs Division, Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400.

1604 MILITARY DEPARTMENT APPOINTMENT OF TRUSTEE

160401. The authority of the Secretary of the Army to appoint trustees without the necessity of official action has been delegated to the Director, DFAS-Indianapolis Center.

160402. The authority of the Secretary of the Navy to appoint trustees without the necessity of judicial action has been delegated to the Head, Fiduciary Affairs Branch, Civil Affairs Division, Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400.

160403. The authority of the Secretary of the Air Force to appoint trustees without the necessity of judicial action has been delegated to the Director, DFAS-Denver Center.

160404. The Director, DFAS-Indianapolis Center, or the Director, DFAS-Denver Center may designate one of the following persons as trustee for Army and Air Force retirees if the trustee is 21 years of age or over:

- A. Lawful spouse (not subject to age retirement)
- B. Legitimate son or daughter or legally adopted son or daughter
- C. Parents
- D. Head of an institution, if member is a patient
- E. Any other person or persons if in the best interest of the member

160402. The Judge Advocate General of the Navy may designate a suitable person, not under legal disability, as trustee to receive and expend all amounts due to Navy or Marine Corps retirees.

A. While a next of kin or other relative of the retiree ordinarily is preferred for designation as trustee, any other person, willing and suitable to act as such may be designated as temporary or permanent trustee unless a committee, guardian, or other legal representative is appointed by a court of competent jurisdiction.

B. Upon the designation of a trustee to receive monies payable to an incompetent Navy or Marine Corps retiree, the Director, Fiduciary Affairs Division, notifies the Director, DFAS-Cleveland Center, Attn: Dir, Retired Pay Operations, A.J. Celebrezze Building, 1240 East 9th Street, Cleveland, OH 44199-2055, of that designation. After such notification, all monies due to the incompetent are paid to the designated trustee.

160403. The trustee designated to receive monies in behalf of the incompetent retiree furnishes a suitable bond in all cases when the amounts to be received may be expected to exceed \$1,000. The bond so required and furnished must have, as the surety, a company approved by the U.S. Government and must be in such amount as required by the Military Department concerned. The person who has been designated as trustee acts in this capacity without remuneration. However, if a bond is required, the premium fee charged by the bonding company may be paid from the funds received on behalf of the mentally incompetent retiree. Any other expenses incurred in securing the bond may not, however, be paid from the amount payable to the incompetent retiree.

160404. The trustee appointed by the Military Department has the authority only to receive, expend, and account for monies received from the appointing Military Department; the appointment does not convey authority to act as a trustee in a civilian capacity without prior authority from a court of competent jurisdiction. The Military Department trustee must use the monies received for the benefit of the incompetent retiree. The Military Department may not appoint a trustee in any case in which a legal committee, guardian or other representative has been appointed by a court of competent jurisdiction.

160405. The designated trustee submits accounting reports annually or at such times as directed by the Military Department. The reports must show all funds received, all expenditures made in behalf of the incompetent retiree, and a statement of the condition of the trustee account at the time the report is submitted. The trustee also may be required to provide all receipts, cancelled checks, or voucher accounts, savings account pass books or statements, or any other records concerning the trustee account. If the trustee fails to report promptly at the end of the accounting period, the appointing authority either may temporarily suspend or terminate further payments to the trustee, and may designate a successor trustee.

160406. Payments due an incompetent retiree cease to be paid to the trustee upon receipt of notification by the DFAS-Cleveland Center of:

- A. Death of the incompetent
- B. Death or disability of the trustee
- C. Receipt of notice that a committee, guardian, or other legal representative has been appointed for the incompetent by a court of competent jurisdiction
- D. Failure of a trustee to render required accounting reports
- E. Probable cause to believe that there is improper use of monies received on behalf of the incompetent;
- F. Receipt of notification that a board of medical officers or other appropriate medical authorities have now found the retiree to be capable of managing his or her affairs. The appointing authority may, at his or her discretion, accept the findings of a Department of Veterans Affairs hospital or of a Public Health Service hospital, or the findings of other public or private institutions, that a person formerly found incompetent is now competent. If payments are terminated under subparagraphs B, D, or E, above, the appointing authority may appoint a successor trustee.

160410. The Director, DFAS-Cleveland Center notifies the Head, Fiduciary Affairs Branch, of any changes in the status of the incompetent retiree's pay account; that is, death of retiree or trustee, appointment of a legal guardian, committee, or other legal representative by a court of competent jurisdiction, waiver of retired pay to receive Department of Veterans Affairs compensation, or failure of trustee to submit required report of existence. The Director also furnishes the Head, Fiduciary Affairs Branch, a report as to the amount of payments made to trustees annually, or as requested, or at the time of a change in the status of the trusteeship.

160411. When payments under this chapter are terminated, the trustee files a final accounting report with the appointing authority. When the final accounting report has been approved, the trustee is discharged and the surety released of its bond. Upon death or disability of a trustee, the trustee's legal representative makes the final accounting report.

#### 1605 COURT APPOINTMENT OF A GUARDIAN OR OTHER LEGAL REPRESENTATIVE FOR PHYSICALLY, OR MENTALLY INCAPACITATED RETIREE

160501. The incapacitated retiree or any person interested in the welfare of the retiree may petition a court of competent jurisdiction for a finding of incapacity and appointment of a guardian or other legal representative.

160502. A copy of the appropriate court order certifying to the appointment of the guardian, committee, or conservator is required before payments may be made to the appointee.

160503. Accounting reports, similar to those identified in paragraph 160408, above, are not required. Such reports, if required by the court, are matters of concern between the court-appointed guardian or legal representative and the court.

1606 COMFORT ITEMS WHILE IN THE HOSPITAL

The commanding officer of any military hospital or the director of a VA hospital may designate an officer under the command to receive and receipt for a sum of money from the accrued pay of a retiree who, as a patient at the hospital, has been found to be physically or mentally incapacitated in a report of medical officers. This money may be used only for the purchase of comfort items for the use and benefit of that retiree when all of the following conditions exist.

160601. A trustee has not been designated and a guardian or other legal representative has not been appointed by a court of competent jurisdiction; and

160602. There are no other funds available for use on behalf of the retiree; and

160603. Competent medical authority agrees that the items to be purchased will serve the comfort of the retiree.

1607 GENERAL MAINTENANCE OF ACCOUNTS

Once the appointment of trustee, guardian, committee, etc., has been made, the supporting DFAS Center shall change or update the account per the appropriate provisions of this regulation.